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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 465

ROSE KATZ,
Petitioner,

vs.

IRA G. KATZ,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

ROSE KATZ petitions for a Writ of Certiorari to review the judgment and opinion of the Supreme Court of Florida which denied a petition for certiorari directed to an opinion and judgment of the District Court of Appeal, Third District of Florida, which affirmed the judgment of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. The opinion of the District Court and the Order and judgment of the Supreme Court of Florida are appended hereto. The Opinion of the District Court of Appeals is reported in 159 So.2d 241 (D.C.A. 3d, 1964). The order and judgment of the Supreme Court of

Florida is as yet unreported. Copies appear in the appendix.

The order and judgment of the Supreme Court of Florida is dated June 26, 1964.

Jurisdiction of this Court is invoked under 28 U.S.C., § 1257 (3).

The question presented for review is whether the Supreme Court of Florida and the District Court of Appeal, Third District, properly denied full faith and credit to a judgment of the Supreme Court of New York in a suit for divorce *a mensa* between the Wife-Petitioner and the Husband-Respondent in which the Court held that the husband had abandoned the Wife without just cause, where such judgment was properly asserted as a defense to the husband's suit for divorce *a vinculo* in the Circuit Court of Dade County, in which the acts of cruelty charged to have been committed by the wife were verbatim those that were asserted in the husband's counterclaim in the New York proceedings and which he withdrew prior to judgment.

Full faith and credit is required to be accorded to judgments of other states by U.S. Const., Art. IV, § 1, which provides as follows: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

The District Court of Appeal, Third District, held that under the decision of the Supreme Court of Florida in *Berman* v. *Berman*, 103 So.2d 611 (Fla. 1958), the Circuit Court of Dade County was correct in failing to sustain the

petitioner's affirmative defense of *res adjudicata* of the New York judgment. The Florida Supreme Court denied certiorari.

The petitioner-wife sued the respondent-husband in the Supreme Court of New York for a divorce *a mensa et thoro* charging him with abandonment without just cause or provocation (R. 25). The husband answered and counterclaimed for a divorce *a mensa et thoro* charging that the wife was guilty of extreme cruelty (R. 29). The allegations of that counterclaim filed in New York are almost verbatim those contained in the complaint subsequently filed by the husband in Florida seeking a divorce *a vinculo* upon grounds of extreme cruelty (R. 11).

The wife, in the New York proceeding, filed a reply to the counterclaim (R. 34). The parties then stipulated that the pleadings be amended (R. 40).

The cause was tried before the Court at which time the husband in the above Court withdrew his counterclaim (R. 44). Upon findings of fact and conclusions of law a judgment in favor of the wife was duly entered (R. 45), which recited that it was predicated upon "defendant's wilful abandonment of the plaintiff without cause." (R. 46).

On May 10, 1962, the husband sued the wife for divorce in the Circuit Court of Dade County, Florida. The allegations of the complaint are almost verbatim those in his New York counteraction (R. 11-17). A copy of the New York judgment was attached to the complaint (R. 18).

The wife answered the complaint and set up the New York judgment claiming that the respondent was barred from maintaining the suit because of the "principles of *res judicata*, and/or collateral estoppel and/or estoppel by judgment" (R. 20-21).

The wife filed a motion for partial decree on the pleadings (R. 48), which was denied (R. 49), and thereafter the Court confirmed its previous order by stating that the ruling had been based on *Berman* v. *Berman, supra* (R. 49).

The cause proceeded to a final decree in which the Court found that the equities were with the husband and that the wife had been guilty of extreme cruelty to plaintiff. The husband was awarded a divorce *a vinculo* (R. 50).

The wife appealed from said decree to the District Court of Appeal, Third District. She assigned as error the action of the Court in denying her claim of *res judicata* under the New York decree (See appendix). That Court affirmed the decree saying in part as follows:

> "At the time of oral argument on the reversal of the final decree in this case, the principal contention urged was the res adjudicata of the previous domestic litigation in the State of New York, which resulted in a decree of separation being entered on behalf of the wife. In view of the decision of the Supreme Court of Florida in the case of Berman v. Berman, Fla. 1958, 103 So.2d 611, it is apparent that the chancellor was correct in failing to sustain the affirmative defense of res adjudicata. The facts in the instant case were almost identical to those related in Berman v. Berman, supra."

The wife thereafter applied to the Supreme Court of Florida for a writ of certiorari to review said opinion and judgment of the District Court of Appeal (R. 2). The petition stated that on the facts set forth the District Court of Appeal, Third District, was presented with the following question* (R. 5):

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*This is in conformity with the Rules of the Supreme Court, Florida Appellate Rules 4.5(6) and 7.2.

"(a) Whether the judgment of the Supreme Court of New York granting a separation a mensa to Rose Katz on the ground that the defendant wilfully and without cause abandoned her on December 24, 1955, was an adjudication that Rose Katz was not guilty of the several acts of cruelty alleged to have been committed by her prior to December 24, 1955, and was entitled to full faith and credit under Article IV, Section 1, U.S. Constitution."

The Supreme Court denied the petition on June 26, 1964, by Memorandum Decision (R. 81).

The reasons why the writ of certiorari should be granted are that the Circuit Court of Dade County, Florida, the District Court of Appeal, Third District, and the Supreme Court of Florida, have failed and refused to accord full faith and credit to the judgment of the Supreme Court of New York in *Rose Katz* v. *Ira G. Katz*, No. 30497/1955, as required by U.S. Const., Art. IV, Sec. 1.

In *50 C.J.S., Judgments*, § 888 b, p. 469, it is said:

"Under the full faith and credit clause of the federal Constitution and the federal statutes enacted thereunder, the judgment of a court of one state, when sued on, pleaded, or introduced in evidence in another state, is entitled to receive the same faith, credit, and respect that is accorded to it in the state where rendered, so that if a judgment is valid and conclusive in the state where rendered it is so in all other states, and a judgment is subject only to such pleas and defenses as would be permissible in the state where the judgment was rendered. * * *"

In *Harding* v. *Harding*, 198 U.S. 317, it was held that the issue of wilful desertion in a California divorce action was identical with the issue of abandonment, without fault, which had been presented in an Illinois separation action.

Accordingly, in order to arrive at the answer to the question here presented, which is whether full faith and credit should have been accorded the New York decree, it is necessary to ascertain what faith, credit and respect the decree *a mensa* in the prior Katz case would be accorded to it by the Courts of New York.

First: Would the Courts of New York have permitted Katz to assert in a subsequent suit against Mrs. Katz in that jurisdiction the matters previously set out in his counterclaim?

The leading New York case concerning the principle of *res adjudicata* is *Schuylkill Fuel Corp.* v. *Nieberg Realty Corp.*, 250 N.Y. 304, 165 N.E. 456. It was there held that:

> "A judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first."

In *Lipscomb* v. *Lipscomb*, 179 Misc. 1025, 40 N.Y. Supp. 2d 720, the husband sued to set aside a separation agreement by reason of fraudulent representations allegedly made by the wife which were relied upon by him at the time the agreement was executed.

Subsequent to the execution of the separation agreement the wife had instituted divorce proceedings in Nevada. The husband pleaded and offered in evidence the separation agreement and asked the Court to approve and ratify it. The husband did not question the provision in the agreement as to the amount and period of payment. Thereafter, the Nevada Court granted the wife a decree of divorce in which the separation agreement was ratified

and confirmed. The Court held that the rule of *res adjudicata* applied and that the husband might not raise the question of the validity of the separation agreement since its validity was directly at issue in the Nevada action. The Court further stated that the circumstances as to the separation agreement were known to the husband at the time of the Nevada action, and, if he believed the agreement to be illegal, he *could* have pleaded such a defense in the Nevada action. Not having done so, but having slept on his rights in that respect at that time, that issue may not be raised in the New York action because in applying the doctrine of *res adjudicata*, it is not necessary that the particular question that is now at issue had been raised and passed upon directly in the former action.

> "It is sufficient if the question at issue *could have been* so raised and litigated in the former adjudication."

Schoelles v. *Uhlendorf*, 34 Misc. 2d 738, 228 N.Y. Supp. 2d 1003, appears to be precisely in point.

In this action plaintiff sought to impress a trust on the assets received by the defendant as the principal beneficiary under a will which had been admitted to probate. The action was based upon fraud and undue influence practiced on the deceased testator. In the probate proceeding, to which the plaintiff was a party, the Surrogate admitted the will to probate. The plaintiff had urged, as a contestant in the probate proceedings, the same grounds in objection to the probate of the will as she was alleging in the present action. On the probate trial, plaintiff's counsel stated that she was not ready to proceed. The Surrogate, however, directed the trial to proceed and denied her attorney's application to withdraw. The Surrogate found that the will had been executed in accordance with the provision of Sec. 21 of the Decedent's Estate Law and that the testator was of sound mind and free of any restraint at

the time she executed the will. Plaintiff, thereafter, unsuccessfully moved to open her default.

The Court, in this action to impress a trust, held that the decree of the Surrogate was a bar to the action and stated that the fact that plaintiff failed to avail herself of the opportunity to offer proof did not destroy the estoppel created by the judgment. In support thereof the court cited the *Schuylkill* case and underscored the phrase which is contained in the above quote, "any that might have been so litigated."

The foregoing cases therefore establish the rule that an unsuccessful defendant cannot plead as a cause of action facts that he could have pleaded as a defense in the prior action. It, therefore, appears clear that since New York would not permit Mr. Katz to assert his present claim, Florida likewise may not permit him to do so.

Secondly: In New York justification for leaving is a sufficient defense in a suit for divorce *a mensa* on the grounds of abandonment.

In *Williams* v. *Williams*, 130 N.Y. 193 (1891), 29 N.E. 98, the wife sued the husband for separation on the ground of abandonment. He asserted as a defense that she had abandoned him. The facts were that the husband had forbidden the wife from seeing her mother. At first she refused to live with him for that reason, but later offered to return unconditionally, which offer he rejected. In deciding the case in the wife's favor, the court found that the husband had coerced the wife into leaving so that her leaving was involuntary and was justified. In its decision, the court said:

> "* * * Under these circumstances, it is clear that the defendant (husband) never had a cause of action in this state against the plaintiff for desertion (abandon-

ment). That term, as used in the law of divorce, contemplates a voluntary separation of one party from the other *without justification* with the intent of not returning." (130 N.Y. at 197). (Emphasis supplied).

The above language is quoted in *People ex rel. Commissioners* v. *Cullen*, 153 N.Y. 629 (1897), 47 N.E. 894 (no abandonment because husband was living apart from wife under a separation decree); *Heyman* v. *Heyman*, 119 App. Div. 182 (1st Dept. 1907), 104 N.Y. Supp. 227 (no abandonment because no voluntary leaving, and intent to return shown); *Deisler* v. *Deisler*, 59 App. Div. 207 (2d Dept. 1901), 13 N.Y. Supp. 398 (relief denied wife in her separation action on ground that husband's leaving was justified by wife's immoral conduct with another man); and in *Simon* v. *Simon*, 6 App. Div. 469 (1st Dept. 1896), 39 N.Y. Supp. 573, aff'd 159 N.Y. 549 (1899), 54 N.E. 1094 (husband sued for separation on ground of abandonment, wife counterclaimed for separation on same ground; separation denied to both parties on ground that negotiations regarding reconciliation were in progress and neither party had proved abandonment).

The *Williams* language was again cited recently in *Diemer* v. *Diemer*, 8 N.Y. 2d 206, 213 (1960); 203 N.Y. Supp. 2d 829. The issues in that case were (a) whether husband (plaintiff) had been justified in leaving home, and suing for separation by the fact that wife had refused to have sexual intercourse with him until he underwent a particular religious ceremony, and (b) whether the fact that husband had pleaded cruelty, but had proven abandonment disentitled him to relief (the dissent was based entirely on this latter point; the majority opinion states that husband had shown himself entitled to separation on at least one ground, that being all that was necessary).

Speaking for the majority, Judge Fuld ruled that husband had clearly made out a case of abandonment and was entitled to a separation "unless his wife had good legal cause to refuse to have sexual intercourse with him. And, as to that, it is equally clear that she had neither cause nor justification." (8 N.Y. 2d at 211). The opinion discusses husband's refusal to undergo the religious ceremony as a justification for wife's constructive abandonment, and found that it was insufficient justification.

The *Diemer* case clearly implies that justification for leaving is a sufficient defense in an abandonment, as stated in the language quoted from the *Williams* opinion, *supra*.

Third: Treatment which is neither sufficiently cruel nor inhuman to provide a defense by way of separation to an action *a mensa* is insufficient as a ground for a separation action and hence for divorce *a vinculo*.

The next point in the present line of argument is that the quantum of cruel and inhuman treatment which amounts to justification for leaving one's spouse, *i.e.*, which is sufficient as a *defense* in a separation action, is less than the quantum required to make out an *affirmative* case for separation. Alternatively stated, treatment which is neither cruel nor inhuman enough to provide a defense, by way of justification, to a separation action brought by the other spouse, is *a fortiori* insufficient as a ground for one's own separation action.

This point was specifically established by the Appellate Division in *Russ* v. *Russ*, 3 App. Div. 2d 883 (4th Dept. 1957), 161 N.Y. Supp. 2d 696, aff'd 4 N.Y. 2d 743 (1948), 148 N.E.2d 911. In that case husband and wife had sued each other for separation, husband alleging wife's abandonment, and wife alleging husband's cruel and inhuman treatment of her. The Appellate Court found that wife had not

shown sufficient cruelty and inhumanity on husband's part to merit a decree of separation in her favor. But she had shown *sufficient* justification to constitute a *defense* to husband's action, and the parties were left where they had been found. The language is instructive:

> "* * * We are satisfied that the cruel and inhuman treatment of appellant (W) by respondent (H) was not established. It does not follow, however, that the latter (H) is entitled to a separation on the ground of unjustifiable abandonment. 'Cruel and inhuman treatment is not the only "justification" which may be pleaded in defense to an action for separation predicated upon allegations of abandonment.' (Citation omitted). We believe that the relations which existed between the parties for a substantial period of time, and respondent's attitude toward his wife, were such that she was justified in leaving him and establishing her own home. In other words, we find that the defendant sustained her defense of justification within the provisions of Section 1163 of the Civil Practice Act. However, in our opinion *the quantum of proof was such that it did not rise to the necessary level to justify the granting of a judgment of separation based upon cruel and inhuman treatment* as set forth in defendant's counterclaim and in our opinion this phase of the case was correctly decided. .. ." (3 App. Div. 2d at 889) (Emphasis supplied).

The *Russ* opinion establishes the rule that a higher level of proof is required to make out a cause of action for separation than to make out a justification defense to the other spouse's action. Conversely, if a spouse has not shown sufficient cruelty, etc., to make out a justification defense, he certainly has not shown cruelty sufficient to warrant relief in his own separation action, since the latter required a higher level of proof than does the former. This brings us to the third and final step of the present line of argument. If "abandonment" means an unjustified

leaving, and if the degree of proof necessary to show justification is less than that required to make out a case for affirmative relief, then the New York Court which granted Mrs. Katz a separation on the specific ground of abandonment necessarily determined that Mr. Katz had no justification for leaving her, and *a fortiori* that he had no cause of action for separation; and that determination would be binding, by way of collateral estoppel, in a later New York separation action brought by Mr. Katz.

In *Statter* v. *Statter*, 2 N.Y. 2d 668 (1957), 143 N.E.2d 10, the husband sued the wife for separation on the grounds of cruelty and abandonment. The wife admitted validity of the marriage, but denied the allegations as to cruelty and abandonment. Judgment was entered in the husband's favor on the ground of abandonment. The Court found, among other things, that the parties were lawfully married.

Over two years later the wife commenced an action for annulment on the grounds that the husband had been lawfully married at the time of his marriage to the present wife and that her consent to the marriage had been procured by fraud. The husband moved to dismiss the complaint on the ground that the judgment in the earlier action was determinative of the issue of the marriage's validity. A denial of this motion by two lower courts were reversed on appeal.

The Court of Appeals cited *Pray* v. *Hegeman* (98 N.Y. 351, 358) and *Ripley* v. *Storer* (309 N.Y. 506, 517), 132 N.E.2d 87, as authority for the proposition that: "Whatever is necessarily implied in the former decision, is for the purpose of estoppel deemed to have been actually decided." (2 N.Y. 2d 672). It then stated that: "It is clear beyond dispute that . . . the existence of a valid marriage (is) a condition precedent to the successful

maintenance of a cause of separation . . . and that a judgment of a separation establishes the existence of a valid and subsisting marriage between the parties. . . ." (*Ibid.*) In other words, the *Statter* case says that anything necessarily determined in one action is *res judicata* in a later action where the same point is in issue. To rule otherwise would "destroy or impair rights or interests established by the first (judgment)." *Schuylkill Fuel Corp.* v. *Nieberg Realty Corp.*, 250 N.Y. 304, 306-07, 165 N.E. 456.

A recapitulation of the line of argument in the present situation, in the light of the foregoing cases, runs as follows: When Mrs. Katz was granted a separation on the ground of abandonment, the Court necessarily determined that Mr. Katz had left her, without justification; he *a fortiori* had no cause of action for separation (the maximum possible remedy for cruel and inhuman treatment in New York) because the earlier judgment is *res judicata* on the question of lack of justification. To grant a divorce now on the same grounds would be equivalent to determining that he had had more than sufficient justification for his leaving, which would amount to a collateral attack on the basis of the first judgment.

Since such recognition would be accorded the decree of separation by the New York courts on motion, it is obvious that under the Full Faith and Credit Clause Florida courts are bound to accord the same recognition to the decree when its validity or limitations are brought in evidence in the courts of this state.

Our position is further supported by the following authorities:

In *Cameron* v. *Cameron*, 68 S.E.2d 796 (N.C. 1952), 31 A.L.R. 2d 436, the question presented for decision was whether the pendency of a prior action by the wife for

a divorce from bed and board upon the ground of abandonment would abate a subsequent action by the husband for an absolute divorce on the ground of a two year separation. In the course of its opinion, the Court said:

> "Where the wife sues the husband for a divorce from the bed and board upon the ground of abandonment under GS § 50-7, subd 1, she must prove as an essential part of her case that her husband has wilfully abandoned her. Brooks v. Brooks, 226 NC 280, 37 SE 2d 909. Where the husband sues the wife for an absolute divorce upon the ground of two years' separation under GS § 50-6, he is not required to establish as a constitutent element of his cause of action that he is the injured party. Taylor v. Taylor, 225 NC 80, 33 SE 2d 492. Nevertheless, the law will not permit him to take advantage of his own wrong. Consequently, the wife may defeat the husband's action for an absolute divorce under GS § 50-6 by showing as an affirmative defense that the separation of the parties has been occasioned by the act of the husband in wilfully abandoning her. Taylor v. Taylor, supra; Pharr v. Pharr, 223 NC 115, 25 SE 2d 471; Byers v. Byers, 223 NC 85, 25 SE 2d 466; Reynolds v. Reynolds, 208 NC 428, 181 SE 338. It follows that a judgment on the merits in favor of Mrs. Cameron in the prior action in Sampson County will operate as a bar to Cameron's prosecution of the subsequent action in New Hanover County. Such judgment will necessarily adjudicate that Cameron has wilfully abandoned Mrs. Cameron."

In *Gloth* v. *Gloth*, 153 S.E. 879 (Va. 1930), 71 A.L.R. 700-710, the Court said:

> "* * * If the desertion of the husband is a bar to a suit for divorce a vinculo brought by the husband on the ground of the adultery of the wife committed after the institution of and during the pendency of a suit for divorce a mensa et thoro brought by the wife on the ground of such desertion (which were the facts

in Kirn v. Kirn, supra), then, on principle, it must follow that a decree judicially establishing the desertion and granting to the wife a divorce a mensa et thoro on the grounds of desertion is a bar to a suit for divorce a vinculo brought by the husband for adultery committed after the entry of the decree a mensa et thoro."

In *Kirby* v. *Kirby*, 55 P.2d 356 (Kan., 1936), the Court said:

"It is true that our statutes do not in terms provide for a decree a mensa et thoro, although in many respects similar relief may be granted under R.S. 60-1506. The fact the decree is for a limited instead of an absolute divorce does not, however, mean the decree is not entitled to full faith and credit to the extent to which it grants relief. In Freeman on Judgments (5th Ed.) Vol. 3, p. 2972, § 1442, it is stated: 'A limited divorce a mensa is as much entitled to full faith and credit under the constitution or principles of international comity as an absolute one. A wife's decree of separate maintenance in another state is conclusive as to every matter adjudicated by it, in harmony with the general rules as to what is adjudicated by such a decree and its effect in a subsequent suit for divorce. If it adjudicates that she was not guilty of cruelty, or that he was guilty of cruelty, it is res judicata on this issue. So if the decree was on the ground of abandonment by the husband, it is conclusive of this fact. If he consented to a decree on a stipulation that she was living separate from him for legal cause, this is conclusive against him in his subsequent suit for divorce in another state. A decree of divorce a mensa in favor of the husband is likewise entitled to the same effect elsewhere as it has where rendered. A decree denying relief in a suit for divorce a mensa is conclusive in a subsequent divorce suit of all the issues adjudicated. Thus a finding against a claim of cruelty is res judicata in the husband's suit for desertion."

See also *Montell* v. *Montell*, 46 So.2d 715 (Fla. 1950), and *Carducci* v. *Carducci*, 92 So.2d 360 (Fla. 1955).

The lower court disposed of these contentions by stating that the question was foreclosed by *Berman* v. *Berman*, 103 So.2d 611 (Fla. 1958).

The *Berman* case did indeed involve the effect of a New York divorce *a mensa* in a subsequent Florida divorce action. In denying effect to the New York judgment, the Supreme Court stated that at the conclusion of the wife's testimony her attorney advised the Court that he did not wish to put on further evidence because he had been informed by his adversary "that the defendant does not intend to contest the action for separation, and we have agreed that the plaintiff will accept and the defendant will pay in a final decree $125.00 a week towards the maintenance of the plaintiff. That is all." The Supreme Court then added that the trial judge said:

> "Judgment is directed in favor of the plaintiff for separation on the ground of abandonment. Alimony is fixed in the sum of $125.00 a week * * *."

Then the Court added this significant statement:

> "In these circumstances it cannot be said that the 'points and questions' presented in the instant suit for divorce were 'actually litigated and decided' in the New York proceeding."

As we have pointed out above the decision of the Supreme Court of New York in the Katz separation suit recited that the cause came on to be heard, that counsel for both parties were present, that the proofs and allegations of the plaintiff had been heard and that the defendant had presented no proof in support of the allegations contained in his answer to the amended complaint. It is true that

the defendant in open court withdrew the counterclaim contained in his answer, but it is not a fact that he consented to the entry of the decree except that he did stipulate that the plaintiff should be paid the sum of $346.15 per week. There was no stipulation that the defendant had wilfully and without cause abandoned the plaintiff on December 24, 1955. These findings were confirmed in the judgment of separation. However, had Katz so admitted he would have no case now.

We reiterate that the decree of the Supreme Court of New York was binding upon the parties, that it adjudicated the guilt of Mr. Katz in abandoning his wife and that it is therefore entitled to full faith and credit under the Federal Constitution. However, if it were a fact that the appellee had consented to the entry of the judgment itself as distinguished from the agreeing to the amount of the alimony, it would still not have disentitled the appellant to rely upon the judgment under the full faith and credit clause.

In *49 C.J.S., Judgments*, Par. 403, page 800, it is said:

> "The rule against collateral attack applies to judgments entered on confession, either in open court or under warrants of attorney, and also to such as are rendered by consent of parties, as the result of a compromise or settlement."

And see *Einstein* v. *Davidson*, 17 So. 563 (Fla. 1895).

In *50 C.J.S., supra*, Par. 705, page 160, it is said that:

> "A judgment entered on the confession of defendant is conclusive evidence of the existence, validity, and amount of the debt, and of the rights of the parties as far as they are necessarily implied in the rendition of such a judgment, and its conclusiveness is not affected by the fact that there was a mistake as to the

amount, due to defendant's false and fraudulent representations. So, also, a judgment rendered on the consent, stipulation, or agreement of the parties is binding and conclusive on them and their privies, successors, or persons claiming under them, in the absence of fraud, collusion, want of power to consent, or want of jurisdiction in the court rendering the judgment. Such a judgment is regarded as conclusive and effective as an estoppel to the same extent as one rendered after a full trial."

Cited to the text is *Hay* v. *Salisbury*, 109 So. 617, 621 (Fla. 1926), wherein the Florida Supreme Court said:

"While the decree relied upon as having adjudicated the rights claimed by the appellant in the instant suit was by default or upon decree pro confesso, yet it does not prevent the decree being conclusive and binding between the parties as to the matters litigated. 15 R.C.L. p. 987, par. 461; United States ex rel. George W. Harshman v. County Court of Knox County, 122 U.S. 306, 7 S.Ct. 1171, 30 L. Ed. 1152.

'The conclusiveness of a judgment upon the rights of parties does in no wise depend upon its form, or upon the fact that the court investigated or decided the legal principles involved. A judgment by default or upon confession is, in its nature, just as conclusive upon the rights of the parties before the court, as a judgment upon demurrer or verdict.' Gifford v. Thorn, 9 N.J. Eq. 722."

We said, in *Huddleston* v. *Graham*, 73 Fla. 350, 74 So. 414:

" 'Where in an equity cause the legal and equitable title to land is adjudicated as between the parties, the decree in said cause will constitute res adjudicata as between the same parties or their privies in a subsequent action at law involving the title to said land.' "

We submit that the New York decree established that Mrs. Katz had given Katz no cause to abandon the matrimonial domicile and that this adjudication as to being without fault is conclusive in our courts under U.S. Const., Art. IV § 1. The lower court erred in denying full faith and credit to the New York decree.

CONCLUSION

The petition should be granted and the judgment of the Supreme Court of Florida should be quashed with directions to set aside the judgment of the District Court of Appeals, affirming the Circuit Court of Dade County, and to direct the Circuit Court to dismiss the complaint brought by the respondent against the petitioner on the ground that the matters and things set forth in the complaint were adjudicated by the New York decree.

Respectfully submitted,

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THOMAS H. ANDERSON

ANDERSON & NADEAU,
Attorneys for Petitioner,
1126 First National Bank Building,
Miami 32, Florida.

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1963

ROSE KATZ, Appellant,
vs.
IRA G. KATZ, Appellee.
Case No. 63-292

IRA G. KATZ, Appellant,
vs.
ROSE KATZ, Appellee.
Case No. 63-326

Opinion filed January 10, 1964.

Appeals from the Circuit Court for Dade County, Hal P. Dekle, Judge.

Anderson & Nadeau; Fowler, White, Gillen, Humkey & Trenam and Harold L. Ward, for Rose Katz.

Milton M. Ferrell; Paul A. Louis and Bertha Claire Lee, for Ira G. Katz.

Before BARKDULL, C.J., and HORTON and TILLMAN PEARSON, JJ.

BARKDULL, Chief Judge.

This appeal involves the correctness of a final decree of divorce. The wife has taken an appeal from the decree and urges that the chancellor erred in granting her husband

a divorce, both in the finding of residence and grounds for divorce; that he awarded inadequate alimony and in failing to sustain her defenses of laches and res adjudicata. The husband has appealed and contends that the chancellor erred in the awarding of alimony and attorney's fees. The appeals were consolidated for determination.

From a review of the record in this case, it is apparent that the chancellor spent considerable time and effort in determining this cause and in reviewing the testimony and evidence presented to him, much of which was in direct conflict. The final decree arrived in this court with a presumption of correctness. See: Picchi v. Picchi, Fla.1958, 100 So.2d 627; Bennett v. Bennett, Fla.App.1962, 146 So.2d 588. It was incumbent upon the parties urging error to demonstrate same. See: Vaughn v. Stewart, 140 Fla. 88, 191 So. 693; Lynch v. Coppola, Fla.App.1961, 129 So.2d 183. No error is found in the chancellor's finding that the husband was a resident of Florida and granting him a final decree of divorce and in rejecting the defenses of condonation and laches. The evidence was in direct conflict as to the reasonableness of attorney's fees and there was substantial, competent evidence before the chancellor to support the award which he rendered, and same will not be destroyed in the face of such evidence. See: Lewis v. Lewis, Fla.App.1958, 104 So.2d 597; Ginsberg v. Ginsberg, Fla.App.1961, 127 So.2d 137. The chancellor had the power to award lump sum alimony in his discretion. See: Rubinow v. Rubinow, Fla.1949, 40 So.2d 561; Cocalis v. Cocalis, Fla.App.1958, 103 So.2d 230; § 65.08, Fla.Stat. The fact that he made the lump sum payable over a period of time is not error. See: Schuberth v. Schuberth, Fla.1951, 52 So.2d 332; Pross v. Pross, Fla.1954, 72 So.2d 671; 10 Fla.Jur., Divorce, § 164. Neither was it error to require the husband to secure the lump sum

award to the wife. See: § 65.08, Fla.Stat., 10 Fla.Jur., Divorce, § 235.

At the time of oral argument on the reversal of the final decree in this case, the principal contention urged was the res adjudicata of the previous domestic litigation in the State of New York, which resulted in a decree of separation being entered on behalf of the wife. In view of the decision of the Supreme Court of Florida in the case of Berman v. Berman, Fla.1958, 103 So.2d 611, it is apparent that the chancellor was correct in failing to sustain the affirmative defense of res adjudicata. The facts in the instant case were almost identical to those related in Berman v. Berman, supra.

In this cause, the wife filed a complaint for separation; the husband answered and filed a counterclaim seeking a separation, urging extreme cruelty. Thereafter, it can be reasonably inferred from the record [because of activities of counsel for the wife] that the husband sought a settlement of their domestic litigation, which was accomplished, and the wife filed an amended complaint. The husband withdrew his original counterclaim, filed an answer to the amended complaint, and the New York judge entered a decree of separate maintenance providing for weekly payments to the wife totalling $18,000.00 a year, which payments the wife accepted at all times. This decree was entered upon proofs.

The only apparent difference between the Berman v. Berman case, supra, and the instant case is that one was submitted on affidavits and the other on proofs. In the Berman v. Berman case, supra, the Supreme Court held that the actions in New York were not res adjudicata as to the action in Florida by the husband. In the instant case, it appears that the decision in Berman v. Berman, supra,

should control and that the husband's action for divorce in Florida should not be barred by the previous New York litigation. As to the defense of condonation, this is a question of fact. See: North v. Ringling, 149 Fla. 739, 7 So.2d 476; Seiferth v. Seiferth, Fla.App.1961, 132 So.2d 471. There was conflicting evidence on this issue; the chancellor resolved these conflicts in favor of the husband. This determination is adequately supported in the record. Therefore, both parties having failed to make error appear in the chancellor's final decree, same is hereby affirmed.

Affirmed.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1964

FRIDAY, JUNE 26, A.D. 1964

ROSE KATZ, Petitioner,

vs.

IRA G. KATZ, Respondent.

Case No. 33,340

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal, Third District of Florida, in said cause bearing date January 10, 1964 and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

(SEAL)

A True Copy

TEST:

/s/ Guyte P. McCord
Guyte P. McCord
Clerk Supreme Court.

ASSIGNMENTS OF ERROR

The defendant, ROSE KATZ, hereby specifies as the errors upon which she will rely in the District Court of Appeal, Third District, for reversal of the Final Decree of Divorce entered herein on January 31, 1963, recorded in Chancery Order Book 1654, Page 328, the following severally:

1. The Court erred in making and entering the Order dated and filed July 12, 1962, recorded July 13, 1962, in Chancery Order Book 1611, Page 63, which Order denied the defendant's Motion to Dismiss.

2. The Court erred in making and entering the Order Denying defendant's Motion to Dismiss dated October 5, 1962, filed October 8, 1962, as it affirmatively appears that the plaintiff was not a bona fide resident of the State of Florida.

3. The Court erred in making and entering the Order dated October 8, 1962, filed October 8, 1962, denying the defendant's Motion for Partial Decree upon the Pleadings, as it affirmatively appears that the plaintiff's claimed cause of action was res adjudicata by reason of the prior proceedings had between the same parties in the courts in the State of New York, wherein the wife instituted an action for divorce a mensa et thoro, which culminated in a Final Decree of Separation in favor of the wife.

4. The Court erred in making and entering the Order dated October 8, 1962, filed October 8, 1962, denying the defendant's Motion for Partial Decree upon the Pleadings, as it affirmatively appears that the plaintiff was estopped by the proceedings had in the courts of the State of New York, which resulted in a Decree of Separation in favor of the wife who was then the plaintiff, as said Decree of

Separation, or limited divorce, operated as an estoppel by judgment to bar the husband from maintaining the within action for divorce.

5. The Court erred in making and entering the Final Decree of Divorce dated and filed January 31, 1963.

6. The Court erred in making and entering the Final Decree of Divorce dated and filed January 31, 1963, as it affirmatively appears that the plaintiff's claimed cause of action was res adjudicata by reason of the prior proceedings had between the same parties in the courts of the State of New York, wherein the wife instituted an action for a divorce a mensa et thoro, which culminated in a Decree of Separation in favor of the wife.

7. The Court erred in making and entering the Final Decree of Divorce dated and filed January 31, 1963, as it affirmatively appears that the plaintiff's claimed cause of action was litigated in prior proceedings had between the same parties in the courts of the State of New York, wherein the wife was plaintiff in an action for divorce a mensa et thoro, which action culminated in a Final Decree of Separation in favor of the wife. That decree operated as an estoppel by judgment, and the Court erred in not so finding and adjudicating.

8. The Court erred in making and entering the Final Decree of Divorce dated and filed January 31, 1963, as it affirmatively appears that the grounds for divorce herein asserted by the plaintiff, and upon which the Court necessarily predicated its decree, were no longer existent, but had been merged in the prior Separation Decree entered by the courts of the State of New York in favor of the wife. The reconciliation between the parties, subsequent to the entry of the New York decree, operated as a condonation

of the acts now asserted by the plaintiff as a basis for his action.

9. The Court erred in making and entering the Final Decree of Divorce dated and filed January 31, 1963, as the Court erred in finding that the equities were with the plaintiff and against the defendant and therein adjudging that the defendant was guilty of extreme cruelty against the plaintiff, the said findings being contrary to the preponderance of the evidence.

10. The Court erred in making and entering the Final Decree of Divorce dated and filed January 31, 1963, as the award to the wife of $166,500.00 payable either in a lump sum or by installments, provided for in the Final Decree, was insufficient as a matter of law in light of the wealth of the plaintiff and the equities in favor of the wife as demonstrated by the record.

11. The Court erred in making and entering the Final Decree of Divorce dated and filed January 31, 1963, and therein adjudicating that the defendant was to be awarded the total sum of $166,500.00, payable in installments, as an appropriate award of a lump sum payment, and then providing for payment thereof in installments, is contradictory and not authorized as a matter of law.

12. The Court erred in making and entering the Order dated March 5, 1963, filed March 5, 1963, recorded in Chancery Order Book 1662, Page 583, to the extent that said Order denied the defendant's Petition for Rehearing.

ANDERSON & NADEAU
By THOMAS H. ANDERSON
Attorneys for Defendant
1126 First National Bank Bldg.
Miami 32, Florida

I HEREBY CERTIFY that a copy of the foregoing Directions to the Clerk and Assignments of Error was mailed to Milton M. Ferrell, 550 Brickell Avenue, Miami 32, Florida, and to Paul A. Louis and Bertha Claire Lee, dupont Building, Miami 32, Florida, Attorneys for Plaintiff, this 26th day of April, 1963.

THOMAS H. ANDERSON